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No. 95-74

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

DON W. STEPHENS, Commissioner, Department of Insurance, Commonwealth of Kentucky, et al., *Petitioners,*

v.

THE OWENSBORO NATIONAL BANK, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS, THE OWENSBORO NATIONAL BANK, THE FIRST NATIONAL BANK OF LOUISA, CITIZENS NATIONAL BANK OF PAINTSVILLE, AND KENTUCKY BANKERS ASSOCIATION, IN RESPONSE TO THE PETITION

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35 pp

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit correctly decided that, under a traditional preemption analysis, the Commonwealth of Kentucky could not enact a statute which would prohibit national banks in small towns from exercising their express power under 12 U.S.C. §92 (1994) to "act as the agent for any fire, life or other insurance company"?

Whether the United States Court of Appeals for the Sixth Circuit correctly decided that a state statute which prohibits a national bank from exercising one of its express statutory powers is not a law "enacted by any State for the purpose of regulating the business of insurance" within the meaning of §2(b) of the McCarran-Ferguson Act, 15 U.S.C. §1012(b) (1994)?

Whether 12 U.S.C. §92, which expressly authorizes a national bank in a small town to "act as the agent for any fire, life or other insurance company" and which specifically contains the word "insurance" five times, is a statute which "specifically relates to the business of insurance" within the meaning of §2(b) of the McCarran-Ferguson Act, 15 U.S.C. §1012(b)?*

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*Pursuant to Supreme Court Rule 29.1, Respondents state that (a) The Owensboro National Bank is a wholly-owned subsidiary of Area Bancshares Corporation, (b) Citizens National Bank of Paintsville is a wholly-owned subsidiary of Citizens National Corporation, and (c) The First National Bank of Louisa is a wholly-owned subsidiary of Community Holding Company. Kentucky Bankers Association does not have a parent company.

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Respondents, The Owensboro National Bank, The First National Bank of Louisa, Citizens National Bank of Paintsville, and the Kentucky Bankers Association (collectively referred to as the "National Banks") submit this brief in response to the petition for a writ of certiorari filed by Petitioners.

STATEMENT OF THE CASE

This petition is one of three petitions for a writ of certiorari currently pending before the Court concerning the identical issue — does §2(b) of the McCarran-Ferguson Act (15 U.S.C. §1012(b) (1994)) authorize the states to prohibit national banks located in small towns from exercising their express statutory power under 12 U.S.C. §92 (1994) to act as insurance agents?

The second petition seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Barnett Bank of Marion County, N.A.* v. *Gallagher*, 43 F.3d 631 (11th Cir. 1995), *cert. petition filed* No. 94-1837 (May 8, 1995).

The third petition seeks review of the decision of the Louisiana Court of Appeals, First Circuit, in *First Advantage Ins., Inc.* v. *Green*, 652 So.2d 562 (La.Ct.App., First Cir. 1995), *cert. denied*, No. 95-C-0820 (La.Sup.Ct. May 5, 1995), *cert. petition filed* No. 94-2130 (June 27, 1995).

In this case, the Sixth Circuit concluded that §2(b) of McCarran-Ferguson did not protect a Kentucky banking statute from preemption. Both the Eleventh Circuit and the Louisiana Court of Appeals decided that §2(b) of the McCarran-Ferguson Act preserved the state statutes in question from preemption and prevents national banks in Florida and Louisiana from exercising their powers under 12 U.S.C. §92.[1]

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[1]Technically, the Louisiana Commissioner of Insurance sought to revoke the insurance agent license of First Advantage Insurance, Inc., a wholly-owned subsidiary of First National Bank of Denham Springs. However, it is undisputed that a national bank may exercise its powers through the vehicle of wholly-owned subsidiaries. *See* 12 C.F.R. §5.34(c); *Independent Ins. Agents of America, Inc.* v. *Ludwig*, 997 F.2d 958 (D.C. Cir. 1993).

While the National Banks believe that the result reached by the Sixth Circuit is correct, the controversy created by these conflicting decisions merits review by this Court. Thus, for the reasons set forth below, the National Banks urge this Court to grant the petitions in all three cases on the McCarran-Ferguson issue, consolidate the cases for review, and finally resolve this important issue.

A. Historical Perspective.

1. CONGRESS' LONG ESTABLISHED PLENARY POWER TO CONTROL NATIONAL BANK POWERS.

Petitioners in this case (collectively the "Insurance Industry")[2] would have this Court believe that the history of the interrelationship of state and federal law relating to national banks began in 1869 when this Court in *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869), determined the business of insurance was not at that time to be treated as interstate commerce within the meaning of the Commerce Clause of the United States Constitution.

Rather, that history began fifty years earlier at the dawn of this country with the seminal decision of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Chief Justice Marshall declared in that case that Congress' authority to establish a national bank was a necessary and proper incident to its constitutional powers to establish a currency, raise and support armies, and in general carry on the fiscal operations of a national government. *Id.* at 399-423.

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[2]Petitioners are Don W. Stephens, the current Commissioner of the Kentucky Department of Insurance, the Kentucky State Association of Life Underwriters, the Independent Insurance Agents of Kentucky, Inc., and the Kentucky Association of Professional Insurance Agents. Commissioner Stephens has been substituted for former Commissioner Elizabeth Wright who was originally named, in her official capacity, as a Defendant in the complaint filed by the National Banks. The District Court permitted the insurance agent trade associations to intervene in opposition to the National Banks.

This Court in *McCulloch* v. *Maryland* further declared unconstitutional, under the Supremacy Clause of the United States Constitution (Art. VI, Clause 2), a Maryland statute that taxed the branches of the Bank of the United States even though there was no federal statute expressly precluding such a state tax. *Id.* at 423-438.

When Congress chose to enact the National Bank Act of 1864 (Act of June 3, 1864, 13 Stat. 99 (1864)) and establish the current national bank system, this Court in *Farmers' and Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29 (1875), described the basis for that law and the limits on state regulation of national banks in the same constitutional language:

> The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *McCulloch* v. *Maryland* (4 Wheat. 316) and in *Osborne* v. *The Bank of the United States* (9 id. 708), therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. . . . Being such means, . . . the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. . . . Against the national will the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control . . . .

Id. at 33-34.

In the *Farmers' and Mechanics' Nat'l Bank* decision, the Court held that a provision of the National Bank Act requiring forfeiture of only interest in an usurious loan transaction preempted a New York law requiring forfeiture of both principal and interest.

In the following years, this Court has repeatedly declared invalid state laws which conflicted with Congressional regulation of national banks. *See Franklin Nat'l*

Bank v. *New York*, 347 U.S. 373 (1954) (national bank's powers under 12 U.S.C. §24 (Seventh) to "receive deposits" and exercise "all such incidental powers as shall be necessary to carry on the business of banking" preempted a New York law prohibiting use of the words "saving" or "savings" in a national bank's advertisements); *Easton* v. *Iowa*, 188 U.S. 220 (1903) (an Iowa statute making it a crime for an officer of any bank in Iowa, including national banks, to receive deposits at a time when the bank was insolvent was preempted because the National Bank Act only prohibited a national bank from receiving deposits after the Comptroller took control of the bank); *Davis* v. *Elmira Savings Bank*, 161 U.S. 275 (1896) (§5236 of the Revised Statutes, requiring that the assets of an insolvent national bank be distributed ratably among its creditors, preempted a New York state law requiring that assets of any insolvent bank in New York be first applied to repay the depositors).

Indeed, the chronicle of federal preemption in the national bank context includes a chapter concerning Respondent, The Owensboro National Bank ("ONB"). Almost 100 years ago, ONB requested this Court to reverse a decision by Kentucky's highest court holding that Kentucky had the power to tax it. The basis for that appeal was that Congress had specified how national banks could be taxed and thereby preempted conflicting Kentucky law. This Court, in an unanimous opinion, reversed the Kentucky court's decision and precluded Kentucky from taxing ONB contrary to Congress' plan. *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664 (1899).

Congress has occasionally acted to preserve state authority over national banks. For example, §30 of National Bank Act of 1864 expressly provided that the interest rate national banks generally could charge was "at the rate allowed by the laws of the state or territory where the bank is located, and no more". *See* Act of June 3, 1864, ch. 106, §30, 13 Stat. 99, 108 (1864).

Another example occurred in 1913 when Congress amended §44 of the National Bank Act (then codified at R.S. §5414) relating to the conversion of state banks to national banks by adding a new proviso that such a conversion "shall not be in contravention of the State law." *See* Act of December 23, 1913, ch. 6, §8, 38 Stat. 251, 258 (1913).

Yet another example occurred in 1940 when Congress amended 12 U.S.C. §24 by adding a paragraph authorizing national banks to make charitable contributions if the national bank "is located in a State the laws of which do not expressly prohibit State banking institutions from contributing to such funds". *See* Act of June 11, 1940, ch. 301, 54 Stat. 261 (1940).

But in each case, state authority over national banks was preserved only by an express statutory reservation. This is not the case with respect to 12 U.S.C. §92.

2. THE ACT OF SEPTEMBER 7, 1916 (12 U.S.C. §92).

With its paramount authority over national banks thus long established, Congress in 1916 decided that national banks in small communities should have the power to act as insurance agents.

At the suggestion of the Comptroller of the Currency, Congress enacted 12 U.S.C. §92 to strengthen national banks in small towns by providing them with an additional source of revenue.[3] Then Comptroller J. Skelton

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[3]*See Act of September 7, 1916*, Pub. L. No. 64-270, 39 Stat. 752, 753-754. This statute was codified in first edition of the United States Code in 1926 at 12 U.S.C. §92, but was "omitted" from the 1952 and subsequent editions of the United States Code based upon the codifier's opinion that the punctuation of a 1918 statute caused the provision to be accidentally repealed. However, because this Court recently held that the statute has always been in effect, the statute has now been again included in the United States Code at 12 U.S.C. §92 (1994). *See United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. ___, 113 S.Ct. 2173 (1993).

Williams' letter to Senator Robert L. Owen is the only contemporaneous legislative history concerning §92 and a copy is reproduced in Appendix A to this Brief.[4]

Section 92 expressly provides:

> In addition to the powers now vested by law in national banking associations . . . any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of Currency, act as the agent for any fire, life or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; . . . .

Section 92 did not then, and does not now, contain any language providing that a national bank's exercise of its insurance agent powers is generally conditioned upon state law. Rather, the statute expressly provides that the national bank agency powers may be exercised "under such rules and regulations as may be prescribed by the Comptroller of the Currency". The only reference to state law is the requirement that the "insurance company" (not the insurance agent) be "authorized by the authorities of the State in which said bank is located to do business in said State . . . ." Congress did not elect to otherwise condition exercise of §92 power on compliance with state law.

When §92 was enacted, there was no outcry that the legislation exceeded Congress' powers. There was no com-

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[4]Comptroller Williams' letter was published in the Congressional Record and this is the source for the copy reproduced in the National Banks' Appendix A. See 53 Cong. Rec. S11001 (1916).

plaint that Congress was acting in a sphere that was the exclusive province of the states. There was no suggestion that a national bank's authority to act as an insurance agent should be contingent upon state law even though Congress had previously expressly placed such conditions on other national bank powers. In sum, §92 was recognized for what it was — the exercise of Congress' plenary power to structure the operations of national banks as it saw fit.

3. §2(B) OF THE MCCARRAN-FERGUSON ACT OF 1945.

Thus, it is surprising that the federal legislation relied upon by the Insurance Industry was not enacted for another 29 years. In 1945, Congress enacted the McCarran-Ferguson Act (15 U.S.C. §1011 *et seq.*) (1994) in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).[5] In *South-Eastern Underwriters*, this Court held that the insurance industry was subject to regulation by Congress under the Commerce Clause, and therefore insurance company activities were subject to federal antitrust laws.

The McCarran-Ferguson Act "operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 n. 18 (1979). "Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies." *Securities Exchange Comm'n* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1968).

The "Declaration of Policy" provision of McCarran-Ferguson stresses that,

> Congress declares that the *continued* regulation and taxation by the several states of the business of insur-

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[5] *Act of March 9, 1945*, ch. 20, 59 Stat. 33 (1945).

> ance is in the public interest, and that the *silence on the part of the Congress* shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. §1011 (1994) (emphasis added).

Of course, in 1945, Congress could not have been preserving a "continued regulation" by the several States of the express powers of national banks since this Court had long before ruled that the states did not possess the power to override national banking powers. Nor had Congress been silent on the issue of small town national bank insurance agent powers since in 1916 Congress had expressly granted that power by enacting §92. Indeed, the Insurance Industry has not identified a single piece of legislative history demonstrating that Congress understood McCarran-Ferguson to be creating any new type of limitation on its previous plenary power over national banks.

Nevertheless, the Insurance Industry now relies upon Section 2(b) of the McCarran-Ferguson Act (15 U.S.C. §1012(b)) which provides, in relevant part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . ., unless such Act specifically relates to the business of insurance . . . .

This statute establishes a rule of statutory construction which precludes a court from construing a federal law to "supersede" a state law — but only if two separate requirements (or "prongs") are met:

1. The state law was "enacted . . . for the purpose of regulating the business of insurance"; and
2. The federal law does not "specifically relat[e] to the business of insurance".

Federal law, and not state law, governs the meaning these terms. *Securities Exchange Comm'n* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959).

This Court has only addressed the meaning of this specific provision three times. In two cases, the Court has addressed the first prong of §2(b). *See Securities Exchange Comm'n* v. *National Securities, Inc.*, 393 U.S. 453 (1968); *United States Dept. of Treasury* v. *Fabe*, ___ U.S. ___, 113 S.Ct. 2202, 2208 (1993). In one case, the Court has addressed the second prong. *See John Hancock Mutual Life Ins. Co.* v. *Harris Trust And Savings Bank*, ___ U.S. ___, 114 S.Ct. 514 (1993).

4. KY. REV. STAT. §287.030(4).

The Insurance Industry argues that a Kentucky statute — Ky.Rev.Stat. §287.030(4) (Baldwin 1994) — prohibits any national bank in Kentucky which is owned by a holding company from acting as an insurance agent for any type of insurance except certain credit-related insurance. They further argue that §2(b) of McCarran-Ferguson insulates this statute from preemption by §92.

Ky.Rev.Stat. §287.030(4) is contained in Chapter 287 of the Kentucy Revised Statutes which is entitled "Banks And Trust Companies".[6] The statute currently states:

> No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgage in the mortgaged property, other than title insurance.

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[6]Kentucky's Insurance Code is codified at Chapter 304 of the Kentucky Revised Statutes.

This statutory prohibition did not exist prior to 1972. Prior to 1972, Ky.Rev.Stat. §287.030(3) (where the statute was codified at that time) only prohibited a person from owning more than one-half of the capital stock of a bank. In effect, Kentucky prohibited bank holding companies, and the prohibition was enacted "as a means of preventing the concentration of financial power in one person or company." *See* Ky. OAG 70-643 at p.4 (*reprinted in* Pet. App. I at 60a-63a).[7] This purpose is entirely consistent with the language of the statute which would not, under any reading, prohibit a bank from acting as an insurance agent if no single person owns more than one-half of its capital stock.

In 1972, Kentucky amended Ky.Rev.Stat. §287.030(3) to authorize the formation of one-bank holding companies. *See* 1972 Ky. Acts Ch. 174, §1. It was at that time that the prohibition on non-credit insurance agent activities by a person who owns or acquires more than one-half of the capital stock of a bank was enacted. In 1981, the Kentucky Attorney General stated that "the clear intent of the legislature [was] to limit the involvement of majority bank shareholders, including one-bank holding companies, in insurance related activities." *See* Ky. OAG 81-173 at p.4.

In 1984, Kentucky amended its banking statutes to authorize the formation of multi-bank holding companies. At that time, the prohibition on insurance agent activity was amended to its current form (which involved no sub-

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[7]Prior to 1972, Ky.Rev.Stat. §287.030(3) stated:

> "No person shall, directly or indirectly, hold or own more than one half of the capital stock of a bank or combined bank and trust company, exclusive of stock held as collateral; but there is no limitation on the amount of capital stock that may be held by the United States or by a corporation in which the United States owns or holds the majority of the stock."

stantive change for purposes of this case) and moved from subsection (3) to its current codification in subsection (4). *See* 1984 Ky. Acts Ch. 130, §2.

B. Proceedings Below.

This dispute over the §92 began in late 1990 when the National Banks each attempted to exercise their powers under 12 U.S.C. §92.[8] Each, by counsel, submitted to the Kentucky Department of Insurance (the "Department") a request for applications to apply for licenses to act as "general lines" and "life" insurance agents. Relying upon Ky.Rev.Stat. §287.030(4), the Department refused to provide the National Banks with the requested applications.

The National Banks then filed this action on January 24, 1991, in the United States District Court for the Eastern District of Kentucky, Frankfort Division, against the Department and its Commissioner seeking a declaration of rights and injunctive relief. During the proceedings, the insurance trade associations intervened on behalf of the Department and its Commissioner. The United States of America intervened as a plaintiff in support of the National Banks.

The National Banks' Complaint alleged that Ky.Rev.Stat. §287.030(4), contrary to the historical position of the Department, does not prohibit banks from acting as agents for the sale of non-credit related insurance.

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[8]It is undisputed that Respondents, The Owensboro National Bank, The First National Bank of Louisa and Citizens National Bank of Paintsville are national banks located and doing business in a town in Kentucky with a population which does not exceed 5,000 inhabitants as shown by the 1990 Census. It is also undisputed that each is a wholly-owned subsidiary of a bank holding company. Respondent, Kentucky Bankers Association (the "KBA") is a trade association of banks in Kentucky, and each of the three respondent national banks is a member of the KBA.

The section only applies to a "person who . . . owns or acquires more than one-half (½) of the capital stock of a bank", *e.g.*, a bank holding company, not to the "bank" itself. Alternatively and assuming the Department's state law interpretation was correct, the National Banks alleged that §92 preempted Ky.Rev.Stat. §287.030(4).

On April 18, 1991, the National Banks filed a motion for summary judgment. For purposes of the motion, the National Banks assumed that the Department's position that Ky.Rev.Stat. §287.030(4) applies to bank subsidiaries was correct.[9] Thus, the issue presented by that motion was whether or not §92 preempted Ky.Rev.Stat. §287.030(4).

In response, the Insurance Industry conducted discovery and then it filed a cross-motion for summary judgment which relied exclusively on Ky.Rev.Stat. §287.030(4) as the sole state law precluding licensing of the National Banks. The Insurance Industry argued that, under traditional preemption analysis, §92 should not be interpreted to preempt Ky.Rev.Stat. §287.030(4). The Insurance Industry also argued that §2(b) of the McCarran-Ferguson Act insulated Ky.Rev. Stat. §287.030(4) from preemption.[10]

On August 4, 1992, the District Court granted summary judgment in favor of the National Banks. Applying a

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[9]The National Banks specifically advised the District Court that "in the event this Court rejects the National Banks' preemption argument, the National Banks reserve the right to litigate, by further proceedings in this court or otherwise, the precise scope of KRS 287.030(4)." *See* Plaintiffs' Memorandum In Support Of Their Motion For Summary Judgment at p.11, n.6. The National Banks have continued to reserve this right and do so here as well.

[10]The Insurance Industry also raised other arguments before the District Court. However, all of those argument were rejected, and the Insurance Industry has not asked this Court to review those decisions.

standard preemption analysis, the District Court stated that it "has no difficulty concluding that §92 preempts Ky.Rev.Stat. §287.030(4)", and the National Banks "may not be prevented from applying for insurance licenses." *Owensboro Nat'l Bank* v. *Moore*, 803 F. Supp. 24, 33-35 (E.D. Ky. 1992) (Pet. App. B at 41a-45a).

The District Court then concluded that neither §287.030(4) nor §92 involves regulation of the "business of insurance" within the meaning of either the first or second prong of §2(b) of McCarran-Ferguson. With respect to §92, the District Court observed that the "function" of §92 is "to grant additional powers to national banks" and concluded that merely because the power "involves insurance does not transform this section into a regulation of the business of insurance." *Id.*, 803 F. Supp. at 36 (Pet. App. B at 46a).

With respect to Ky.Rev.Stat. §287.030(4), the District Court "reache[d] the inescapable conclusion" that the statute "does not regulate the business of insurance" within the meaning of §2(b) of McCarran-Ferguson. The Court observed that the statute "regulates bank holding companies", does not appear in the chapter of the Kentucky Revised Statutes regulating insurance, and does not "relat[e] . . . to the powers of insurance companies or agents". *Id.*

The District Court then examined how the three factors identified by this Court in *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119 (1982), for determining what is the "business of insurance" applied to the statute.[11] The Dis-

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[11]The three factors identified in *Pireno* are:

> "[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."

Pireno, 458 U.S. at 129.

trict Court concluded that none of the three factors were applicable. Finally, the District Court cited the Third Circuit's decision in *United Services Auto Ass'n* v. *Muir*, 792 F.2d 356, 364 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), in which that court held that a Pennsylvania statute prohibiting the affiliation of insurance companies and lending institutions was designed to prevent competition and had "no part in the business of insurance under McCarran-Ferguson." *Id.*

The Insurance Industry appealed to the United States Court of Appeals for the Sixth Circuit. On December 29, 1994, the Sixth Circuit affirmed the District Court's judgment in a 2-1 decision. *Owensboro Nat'l Bank* v. *Stephens*, 44 F.3d 388 (6th Cir. 1994) (Pet. App. A at 1a-25a). All three judges agreed that §92 preempts §287.030(4) under traditional preemption analysis. *Id.* at 390-391, 393. However, the judges disagreed as to the proper application of §2(b) of McCarran-Ferguson in light of this Court's decision in *United States Department of Treasury* v. *Fabe*, ___ U.S. ___, 113 S.Ct. 2202 (1993), which was decided after the District Court's decision.

In analyzing the first prong of McCarran-Ferguson §2(b), the majority in *Owensboro* quoted the general test established by *Fabe* that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance". *Owensboro*, 44 F.3d at 392 (Pet. App. A at 9a). The majority then stated that "[i]f . . . the issue arises of whether a particular activity is part of the 'business of insurance,' the *Pireno* criteria apply." *Id.*

As a result, the panel's majority reached the quite unremarkable conclusion that "to have been 'enacted . . . for the purpose of regulating the business of insurance,' [Kentucky's] section 287 must possess the aim of regulat-

ing activities that meet the *Pireno* criteria" for what is "the business of insurance". *Id.* The panel majority explained that it did not believe Ky.Rev.Stat. §287.030(4) met this test:

> Excluding a person from participation in an activity, however, is different from regulating the manner in which that activity is conducted. The former is regulation of the person; the latter is the regulation of the activity. Section 287 . . . in no way governs the manner in which the activities constituting the 'business of insurance' are conducted. Section 287 thus is different in kind from the Ohio statute that was found to regulate the business of insurance in *Fabe*, since the Ohio statute set standards for 'the actual performance of an insurance contract.' ___ U.S. at ___, 113 S.Ct. at 2210. . . . [W]e conclude that section 287 was enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance . . . .

Owensboro, 44 F.3d at 392 (Pet. App. A at 9a).

In effect, the panel's majority concluded that in entirely prohibiting national banks from becoming agents of insurance companies, Ky.Rev.Stat. §287.030(4) does not "regulate" the "relationship between the insurance company and the policyholder" and its "indirect effects", if any, on policyholders are "too tenuous" under *Fabe* to fall within the first prong of §2(b). *See Fabe*, 113 S.Ct. at 2212.

Since this disposed of the Insurance Industry's McCarran-Ferguson argument, the majority did not reach the issue of whether or not §92 "specifically relates to the business of insurance" within the meaning of the second prong of McCarran-Ferguson.

Judge Batchelder dissented on the issue of how to apply §2(b) of McCarran-Ferguson. She concluded that both prongs of McCarran-Ferguson were satisfied, thereby saving Ky.Rev.Stat. §287.030(4) from preemption.

With respect to the first prong of §2(b), Judge Batchelder believed that Kentucky "enacted [its] statute out of a direct concern for future policyholders." *Id.* at 397. Relying heavily on the view of the Florida District Court in *Barnett Bank* of the purpose of Florida's statute,[12] she believed that Ky.Rev.Stat. §287.030(4) was intended to keep banks from being licensed because "consumer[s] could feel coerced into purchasing insurance from the bank". She also believed that the statute was designed to "ensur[e] that insurance companies remain solvent." *Id.*

Thus, Judge Batchelder concluded that the statute met the requirement in *Fabe* that it be enacted to protect or regulate the relationship between the insurer and the policyholder. Judge Batchelder further believed that Kentucky's prohibiting a class of persons from acting as non-credit insurance agents was a sufficient "regulation" of the "business of insurance" as to fall within the first prong of McCarran §2(b).

Judge Batchelder then turned to the second prong of §2(b) and concluded that 12 U.S.C. §92 does not "specifically relate" to the business of insurance. Judge Batchelder did not consider this Court's recent decision in *John Hancock Mutual Life Ins. Co.* v. *Harris Trust And Savings Bank*, ___ U.S. ___, 114 S.Ct. 514, 525 (1993), which concluded that "ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and spe-

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[12]Florida's statute, which is contained in Florida's Insurance Code, prohibits all insurance agents from engaging in insurance agency activities "as a employee, officer, director, agent, or associate of a financial institution agency." A bank is a "financial institution" unless the bank is not a subsidiary or affiliate of a bank holding company and is located in a city with a population of less than 5,000. *See* Fla.Stat.Ann. §626.988 (West Supp. 1995).

cifically relates to the business of insurance." Rather, she believed that the decision in *Fabe* established a "clear statement rule" under which a federal statute "must 'clearly state' that it regulates the business of insurance or otherwise intends to preempt a contrary state law." *Owensboro* 44 F.3d at 398 (Pet. App. A at 22a). Judge Batchelder believed that §92 did not meet this test because the "context of §92 has always been within the regulation of banking rather than insurance." *Id.*

After the Sixth Circuit denied the Insurance Industry's petitions for rehearing and rehearing en banc, the Insurance Industry filed their petition for writ of certiorari.

THE WRIT SHOULD NOT BE HELD IN ABEYANCE. IT SHOULD BE GRANTED BUT ONLY ON THE McCARRAN-FERGUSON ACT ISSUE.

The Insurance Industry seeks to argue two principal issues before this Court. One issue is a standard federal preemption question. The second issue involves the proper application of the first and second prongs of §2(b) of the McCarran-Ferguson Act.

However, the Insurance Industry does not wish this case to be the vehicle for deciding those issues. Instead, they urge that "the Court hold this petition pending review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit in *Barnett Bank of Marion County, N.A.*, 43 F.3d 631 (11th Cir. 1995), *cert. petition filed* No. 94-1837 (May 8, 1995), and then grant the petition, vacate the Sixth Circuit's decision, and remand for reconsideration in light of this Court's decision in *Barnett.*" (Petition at 2).

The Insurance Industry is represented by the same law firm that represents the insurance agent trade associa-

tions in the *Barnett Bank* case.[13] Therefore, it is no surprise that the Insurance Industry would be willing to have the National Banks' rights in this case turn on a decision in *Barnett Bank*.

The National Banks do not believe that the Insurance Industry should be permitted to have their counsel litigate their dispute with the National Banks using the vehicle of another case in which the National Banks have no voice. If the National Banks' rights are to be affected by a decision from this Court argued by their opponents' counsel, then fundamental fairness requires that the National Banks be given the equivalent opportunity to participate as parties before this Court.

Since the National Banks agree that the McCarran-Ferguson issue is one which deserves review by this Court, the National Banks submit that the only proper course is to grant the petition in this case and consolidate the case with *Barnett Bank* and *First Advantage*.

In granting the petition, however, the Court should limit review to the McCarran-Ferguson issue and should not review the decision that §92 preempts Ky.Rev.Stat. §287.030(4) under traditional preemption analysis.

I. THE SIXTH CIRCUIT CORRECTLY APPLIED TRADITIONAL FEDERAL PREEMPTION ANALYSIS ABOUT WHICH THERE IS NO CONFLICT.

None of the judges below had any trouble "conclud[ing] that, under conventional preemption analysis, §92 preempts

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[13]Ann M. Kappler of Jenner & Block, Washington, D.C., is counsel of record for all of the Petitioners in this case as well as for the Respondents, Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc. and Florida Association of Insurance Agents, in *Barnett Bank*. She is also counsel of record for the Louisiana insurance trade associations in *First Advantage*.

section 287." *Owensboro*, 44 F.3d at 391 (Pet. App. A at 7a). Even dissenting Court of Appeals Judge Batchelder agreed with this conclusion. *Id.* at 393 (Pet. App. A at 11a).

The conflict that the Sixth Circuit resolved in favor of federal law was succinctly summarized in the majority opinion — "while §92 provides that national banks such as plaintiff 'may' act as insurance agents, section 287 provides that they 'may not.' " *See Owensboro*, 44 F.3d at 390-391 (Pet. App. A at 5a). *Accord Hillsborough County, Florida* v. *Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985) (preemption occurs "when compliance with both federal and state regulations is a physical impossibility").

The Insurance Industry does not argue that this conclusion was in conflict with the holding of another federal Court of Appeals or a state court of last resort. Nor did the Sixth Circuit's reasoned analysis of the Insurance Industry's arguments conflict with the applicable decisions of this Court. Rather, the Sixth Circuit correctly cited and applied the decisions in *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), and *Fidelity Federal Savings and Loan Assn.* v. *de la Cuesta*, 458 U.S. 141 (1982), where this Court similarly struck down state attempts to limit optional powers of federally chartered financial institutions.

The Insurance Industry's entire argument as to why this conclusion should be revisited by this Court is set forth in a single footnote in which the Insurance Industry argues that "[b]ecause the two provisions may be harmonized, however, the Sixth Circuit's conclusion is erroneous." (Petition at 14, n.10). However, both the lower courts expressly addressed this argument and easily rejected it. There is no reason to revisit this conclusion.

II. THE McCARRAN-FERGUSON ACT ISSUE IS AN IMPORTANT QUESTION DESERVING REVIEW BY THIS COURT.

The National Banks agree that there is a square conflict among the circuits and a state court of last resort as to the proper application of the §2(b) of the McCarran-Ferguson Act to national bank powers generally and §92 in particular. There is also much disagreement among those courts as to how to apply this Court's recent decisions in *Fabe* and *John Hancock* to this dispute.

These conflicts and disagreements have been exhaustively presented to this Court in the numerous writ petitions, responses and *amici* briefs previously filed in *Barnett Bank*[14] and *First Advantage*.[15] In all of the filings, the parties and *amici* have agreed that the issues are of great import. No party or amicus has suggested to this Court that review should not be had of these disputes.

Thus, the National Banks will not unduly burden this Court with a repetitive analysis of why review should be had on the important McCarran-Ferguson Act issue raised by this and the other two cases. Quite simply, there are

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[14]*Petition of Barnett Bank of Marion County, N.A.*, No. 94-2130 (May 8, 1995); *Response of Commissioner of Insurance, et al.*, No. 94-2130 (July 28, 1995); *Brief of the United States and Comptroller of the Currency As Amici Supporting Petitioner*, No. 94-2130 (July 7, 1995); *Brief of the Amici Curiae Consumer Bankers Association, et al.*, No. 94-2130 (July 7, 1995); *Brief of the New York Clearing House Association As Amicus Curiae*, No. 94-2130 (July 7, 1995); *Brief of the Amici Curiae American Bankers Association, et al.*, No. 94-2130 (July 7, 1995).

[15]*Petition of First Advantage Insurance, Inc. et al.*, No. 94-2130 (June 27, 1995); *Response of Commissioner of Insurance, et al.*, No. 94-2130 (July 28, 1995); *Brief of the Amici Curiae American Bankers Association, et al.*, No. 94-2130 (July 17, 1995).

"special and important reasons" for this Court to grant review. *See* Sup.Ct.Rule 10.1.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR PRESENTING THE McCARRAN-FERGUSON ACT DISPUTE.

In other situations, this Court has consolidated for review parallel petitions raising the same issue. *See Pauley* v. *Bethenergy Mines*, 501 U.S. 680 (1991) (consolidated review of conflicting decisions of the Third and Fourth Circuits on validity of Department of Labor regulations implementing the Black Lung Benefits Reform Act of 1977). Such consolidation is particularly appropriate here when the Petitioners in this case are represented by the same counsel who is counsel of record in *Barnett Bank*.

The Insurance Industry offers two reasons why such consolidation should not occur. (Petition at 17-19). Both reasons should be rejected.

First, the Insurance Industry argues that a proper record does not exist in this case regarding Kentucky's "purpose in enacting its licensing prohibition." The National Banks disagree since the record includes the 1970 Kentucky Attorney General's opinion which states that the purpose of Ky.Rev.Stat. §287.030(4) is to "prevent the concentration of financial power in one person or company." *See* OAG 70-643 (Pet. App. I at 63a).[16] Furthermore, the Insurance Industry conducted discovery before the District

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[16]The Insurance Industry also refers to a 1991 Resolution of one chamber of the Kentucky General Assembly which is dated 7 days after the National Banks filed their lawsuit. (Petition at 10, n.7). This resolution does not have the force of law nor even the weight of an attorney general's opinion. It is merely a *post hoc* opinion which is not entitled to any weight. *Russello* v. *United States*, 464 U.S. 16, 26 (1983) ("[I]t is well settled that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

Court and filed their own motion for summary judgment. It is much too late for the Insurance Industry to argue that there is an inadequate record. In addition, the Florida and Kentucky statutes and their respective legislative histories may, in fact, aid this Court by providing two concrete statutory schemes against which the Court can apply an analysis of the first prong of McCarran-Ferguson §2(b).

Second, the Insurance Industry argues that the existence of a controversy over whether Ky.Rev.Stat. §287.030(4) applies to a national bank should preclude review. Neither the District Court nor the Court of Appeals found this to be an obstacle to review (particularly when the point was not raised by the Insurance Industry before the Court of Appeals). As the District Court succinctly explained, "it is sufficient for the purpose of this inquiry [federal preemption] that the Commissioner has applied it in such a manner" as to restrict the National Banks' activities. *Owensboro*, 803 F. Supp. at 34, n.7 (Pet. App. B at 41a).

Barnett Bank of Marion County suggests two additional reasons for reviewing the *Barnett Bank* decision in lieu of this case. *Petition of Barnett Bank of Marion County, N.A.*, No. 94-2130 (May 8, 1995) at 17. First, it argues that this case does not present a "concrete setting". That is not correct. The National Banks initially were expressly prohibited from obtaining insurance agent licenses and this has concretely restricted their activities. Moreover, in compliance with the District Court's judgment, a non-credit insurance agent license has been issued to Owensboro National Bank which the Department would presumably attempt to revoke if the Sixth Circuit's decision were reversed.

Second, the Florida bank relies upon the failure of the Sixth Circuit panel's majority to address the "specifically relates" prong of McCarran-Ferguson §2(b). The National Banks believe that this legal issue has been sufficiently framed by the opinions of District Judge Hood and Circuit

Judge Batchelder to justify reviewing this case along with the *Barnett Bank* decision.

Finally, this is the only case of the three in which the United States has participated as a party on behalf of the Comptroller of the Currency. Given the importance of the case for national bank powers nationwide, it is appropriate that this Court's review include the only case in which the United States and the Comptroller are parties.

CONCLUSION

For the foregoing reasons, the National Banks respectfully urge this Court to grant the petition for a writ of certiorari limited, however, to the proper interpretation and application of §2(b) of the McCarran-Ferguson Act.

Respectfully submitted,

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September 13, 1995

APPENDIX

APPENDIX A

TREASURY DEPARTMENT
COMPTROLLER OF THE CURRENCY
Washington, June 8, 1916.

MY DEAR SENATOR: The original national-bank act of February 25, 1863, as reenacted by the act of June 3, 1864, authorizing the formation of national banks throughout the country, provided that no national bank should be authorized with a capital of less than $50,000 in any place; that in a place with a population exceeding 6,000 the capital of the bank should not be less than $100,000, and further provided that no national bank with a capital of less than $200,000 should be organized in any place having a population of over 50,000.

Later on it became manifest that there were many country towns and villages which needed banking facilities but which did not have sufficient business to justify the organization of national banks with a capital of as much as $50,000. To extend the benefits of banking facilities to these small places the national-bank act was amended by the act of March 14, 1900, so as to authorize the organization in towns and villages with a population not exceeding 3,000 of banks with a minimum capital of $25,000.

Since this amendment to the bank act went into effect there have been organized throughout the country 3,084 national banks having a capital of $25,000. Four hundred and thirty-eight of these $25,000 banks have either failed or gone into liquidation, some have increased their capital, and the number of such banks with a capital of $25,000 now in operation is 2,079, or 27 per cent of the total number of national banks.

The average deposits (individual and bank) at this time of all $25,000 banks is $178,138, or 7.13 times their capital and 4.6 times their capital, surplus, and profits. A country bank with $25,000 capital and with the average deposits is able, with good management, to lend its money at rates authorized by law and at the same time to return a rea-

sonable dividend to its shareholders. But there are many banks located in country communities where the small deposits which the banks receive may make it somewhat difficult for the banks to charge on their loans only the rates of interest permitted by law and at the same time yield a satisfactory return to shareholders, and in many such cases banks have been tempted to exact excessive and in some cases grossly usurious rates on accommodations which they extend to local borrowers. It is unfortunately true that in many other cases banks have been demanding usurious rates of interest even though they had more than the average deposits and although adherence to the legal rates would still yield them liberal dividends on their shares.

For some time I have been giving careful consideration to the question as to how the powers of these small national banks might be enlarged so as to provide them with additional sources of revenue and place them in a position where they could better compete with local State banks and trust companies which are sometimes authorized under the law to do a class of business not strictly that of commercial banking.

Under section 5736, United States Revised Statutes, the business of national banks at this time is limited to the exercise of "such incidental powers as shall be necessary to carry on the business of banking by (a) discounting and negotiating promissory notes, drafts, bills of exchange or either evidences of debt: (b) receiving deposits; (c) buying and selling exchange, coins, and bullion; (d) loaning money on personal security; (e) obtaining, issuing, and circulating notes according to the provisions of this title."

Under the Federal reserve act the banks are further authorized under specified restrictions to make certain loans on real estate.

National banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies or as brokers or agents for others in procuring or making real estate loans.

The courts have uniformly held that such corporations can exercise only those powers which are expressly granted or which are necessarily incidental to powers that are granted.

As stated by Mr. Justice Harlan, in delivering the opinion of the United States Supreme Court in the case of Logan County National Bank v. Townsend (139 U.S., 67):

"It is undoubtedly true, as contended by the defendant, that the national banking act is an enabling act for all associations organized under it, and that a national bank can not rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

Again in the case of *National Bank* v. *Matthews* (98 U.S., 625), Mr. Justice Swan, in delivering the opinion of the court, said:

"Section 5136 does not in terms prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed."

It is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law.

My investigations lead me respectfully to recommend to Congress an amendment to the national-bank act by which national banks located in villages and towns having a population of not exceeding 3,000 may be permitted to act as agents for insurance companies in the placing of policies of insurance — fire, life, etc. — and that they may also be authorized to act as agent for the negotiation of loans on farms or other real estate in their respective sections of the country, where they may be in a position to have some direct knowledge as to the value of the property upon which such loans are to be secured.

It seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities. This additional income will strengthen them and increase their ability to

make a fair return to their shareholders, while the new business is not likely to assume such proportions as to distract the officers of the bank from the principal business of banking. Furthermore in many small places the amount of insurance policies written or mortgages to be placed on commission is not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others.

I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where this legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores. The business is one requiring training, skill, and application, and I think that the profession of banking would suffer if there should be a departure from the principles which should govern and have heretofore governed.

I enclose with this a draft of a proposed amendment to the national banking act designed to empower national banks located in towns of not over 3,000 population, under such regulations and restrictions as may from time to time be approved and promulgated by the Comptroller of the Currency, to act as agents for the placing of insurance policies and also to act as agent in making or procuring loans on real estate.

I respectfully recommend and urge the adoption of such an amendment for the reasons I have given.

I am to-day writing a letter similar to this to Congressman Glass, chairman of the Banking and Currency Committee of the House of Representatives.

Respectfully,

Jno. Skelton Williams,
Comptroller

Hon. Robert L. Owen,
United States Senate.